No. 93-862

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BELL SOUTH ADVERTISING & PUBLISHING CORPORATION,
Petitioner,
v.
DONNELLEY INFORMATION PUBLISHING, INC., and
THE REUBEN H. DONNELLEY CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF AMICI CURIAE AMERITECH PUBLISHING, INC., NYNEX CORPORATION, AND BELL ATLANTIC CORPORATION IN SUPPORT OF PETITIONER

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December 28, 1993

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MOTION OF AMERITECH PUBLISHING INC., NYNEX CORPORATION, AND BELL ATLANTIC CORPORATION FOR LEAVE TO FILE A BRIEF IN SUPPORT OF PETITION OF BELLSOUTH FOR A WRIT OF CERTIORARI

Pursuant to Rule 37 of the Rules of this Court, Ameritech Publishing, Inc., NYNEX Corporation, and Bell Atlantic Corporation request leave to file a brief as amici curiae in support of BellSouth Advertising and Publishing Corporation's ("BAPCO") petition for a writ of certiorari to the United States Court of Appeals for the Eleventh

Circuit. Petitioner BAPCO granted consent; however, amici were unable to obtain the consent of Respondents Donnelley Information Publishing, Inc. and the Reuben H. Donnelley Corporation.

This case involves the nature and scope of copyright protection to be afforded yellow pages directories and other compilations in which factual data are selected and arranged according to particular headings and subheadings chosen by directory publishers. Ameritech Publishing, Inc., NYNEX Corporation, and Bell Atlantic Corporation directly or through subsidiaries, publish both "yellow pages" and "white pages" telephone directories and compile computerized data bases.

Amici are concerned about the implications of the opinion by the *en banc* court of the Eleventh Circuit. If accepted by other courts, the reasoning in this opinion threatens to eviscerate copyright protection for the creative and original portions of yellow pages telephone directories, computerized data bases, data base management systems, the content of the "information superhighway," and other similar works.

Amici also believe that their participation in this appeal is helpful in providing the Court with additional information about the original efforts involved in the creation of yellow pages and how those efforts relate to the creation of other types of data bases. In the accompanying brief, Amici offer their views as to why the selection of headings and the selection of particular listings to be associated with such headings reflect substantial originality, and are crucial to the creation of competitive yellow pages directories and other similar compilations.

Amici also have a significant financial stake in this litigation. If the position of the Eleventh Circuit were adopted by other courts, the fruit of Amici's creative efforts in developing yellow pages directories would be at risk. For the foregoing reasons, the Court should grant

Ameritech Publishing, Inc., NYNEX Corporation, and Bell Atlantic Corporation leave to file the attached brief as amici curiae in support of the petition of BAPCO for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

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QUESTION PRESENTED

Whether the court below erred in concluding that the selection, coordination, or arrangement of the headings and the listings under those headings in a yellow pages directory is not sufficiently creative to qualify for copyright protection, so that a rival publisher does not violate the registered copyright in the work when it engages in wholesale copying of that compilation.

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BRIEF OF AMICI CURIAE AMERITECH PUBLISHING, INC., NYNEX CORPORATION, AND BELL ATLANTIC CORPORATION IN SUPPORT OF PETITIONER

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals is reprinted at 999 F.2d 1436. Citations herein are to the Appendix of Petitioner.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Clause 8 of the United States Constitution, and the Copyright Act of 1976, 17 U.S.C. § 101 et. seq. are set forth in the Appendix of Petitioner.

JURISDICTION

Amici adopt the Jurisdictional Statement of Petitioner.

INTEREST OF AMICI

Amici Curiae, Ameritech Publishing, Inc. (also known as "Ameritech advertising services"), NYNEX Corporation, and Bell Atlantic Corporation submit the following brief in support of the Petition of BellSouth Advertising and Publishing Corp. ("BAPCO") for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Amici are engaged in the business of, among other things, compiling yellow pages telephone directories. Based upon that experience, Amici believe that Eleventh Circuit Court of Appeals, sitting *en banc*, has substantially underestimated the scope and nature of (1) the creative efforts involved in the preparation of yellow pages; and (2) the copyright protection afforded yellow pages and other compilations. As a result, the Eleventh Circuit has improperly held that the efforts of yellow pages and other data compilation businesses to select, coordinate and arrange information in an original, creative, and commercially valuable manner are not protected by copyright—but instead may be appropriated at will by competitors.

The decision below affects not only the yellow pages industry, but it also has substantial implications for the content of the "information superhighway," for legal research information data bases such as WESTLAW® and LEXIS®, and for catalogues and directores of every kind, all of which are compilations of facts. Because of the importance of these issues to Amici, to the yellow pages industry as a whole, and to other data compilation businesses, Amici submit this brief in support of the Petition of BAPCO for a writ of certiorari to the Eleventh Circuit.

SUMMARY OF ARGUMENT

This Court's decision in *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282 (1991) ("*Feist*"), establishes that Respondents ("Donnelley") may copy into a data base each of the names, addresses and telephone numbers listed in a white pages directory. The petition pending before this Court, however, involves far more than simply the reproduction of alphabetical white pages listings or even yellow pages listings. In developing its competing yellow pages directories, Donnelley also has copied into its data base the particular listings associated with each of BAPCO's headings, thereby copying BAPCO's classifications of thousands of individual businesses. Nothing in *Feist* or its progeny permits Donnelley to expropriate the commercially valuable creative effort that goes into determining such classifications.

Feist makes clear that the selection and arrangement of facts are protected by the compilation copyright if that selection or arrangement reflects "originality." Originality requires only that the author make the selection independently and that the selection "display some minimal level of creativity." *Feist Publications, Inc.*, 111 S. Ct. at 1294. There can be no question that yellow pages, including their ad displays, are copyrightable; indeed, the Eleventh Circuit noted below that Donnelley had conceded that point. (App. 4a, 6a-7a.) In addition, the compilation of yellow pages directories requires substantial efforts on the part of publishers in selecting particular headings, associating the individual listings with those headings and arranging those listings within each heading which are also copyrightable.

As the dissent noted below, there is "no factual dispute" that Donnelley "substantially appropriated BAPCO's selection of headings" and "other original acts of selection and arrangement." (App. 39a.) Such efforts more than satisfy the "minimal" standard of originality articulated by the Supreme Court in *Feist*. Indeed, if those efforts are

not protected by copyright, it is difficult to imagine a case where data bases will be protected by the copyright laws.

This Court should grant BAPCO's petition for a writ of certiorari in order to resolve conflicting lower court applications of *Feist* to data compilations, and to reverse a decision which would otherwise effectively eviscerate the protection Congress intended to afford data compilations under the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF CRITICAL IMPORTANCE TO YELLOW PAGES AND OTHER DATA COMPILATION BUSINESSES

Certiorari should be granted to resolve an issue which is of critical importance to the parties, to Amici, and to other information compilation businesses. That issue—which concerns the nature and level of creativity necessary to warrant copyright protection for data bases—has now been squarely presented to this Court by the decision of the Eleventh Circuit below, sitting *en banc*. The decision below reaches the very heart of the copyrightability of the original aspects of selecting and arranging the content of data base compilations, such as yellow pages directories; and it has serious and immediate implications for the activities of data compilation businesses nationwide.

A. The Decision Below Underestimates the Substantial Level of Creativity Involved In Creating Yellow Pages Directories

1. *The Selection of Yellow Pages Headings Reflects Substantial Originality*

The Eleventh Circuit held—despite the District Court's findings to the contrary (see App. 80a-81a)—that "BAPCO failed to present evidence that, even if copied,

its heading structure constitutes original expression warranting copyright protection." (App. 14a.) Indeed, the Eleventh Circuit opinion gives the misimpression that publishers of such directories do little more than rely on the "standardized headings" of the National Yellow Pages Service Association, or utilize "such [] obvious label[s]" for headings, such as "attorneys," that the heading selection process involves no original expression or creative endeavor. (App. 14a.)

The opinion below vastly understates the creativity involved in selecting directory headings. Publishers of yellow pages directories do make use of an industry-wide reference guide. But it is wrong to suggest that yellow pages directories such as those published by Amici can be created entirely through reliance on such a guide. To the contrary, the process of selecting particular headings for a particular directory entails a considerable degree of ingenuity and creativity.

A yellow pages publisher chooses what may be anywhere from a few hundred to a few thousand different headings, as the publisher deems necessary and appropriate for each individual directory. The publisher must formulate, and continuously revise and refine, its selection of headings to ensure that they are responsive to the ever-changing needs, habits and tastes of consumers. Directory publishers seek to tap into the mindset of the public they serve—to create a directory that will appeal to their evolving audiences, just as a writer of popular music or books attempts to create a work with commercial appeal.

A "user-friendly" directory—one that can be used easily by a consumer without reference to instructional materials—is, of course, important to consumers, who might not otherwise find the particular product or service they wish to purchase. It is equally important to the advertiser, who wants the consumer to locate a listing with sufficient ease so as not to be discouraged by the search process.

Consumers will not use, and businesses will not advertise in, a yellow pages directory that is not "user-friendly."

Because judgment is necessarily involved in determining what makes a directory appealing to consumers, no two yellow pages publishers select the same set of headings (absent, of course, unauthorized copying). To be sure, there are standardized headings such as "attorneys" and "banks" that seem to be common to all directories. There are, however, a host of headings whose inclusion in, or exclusion from, a particular directory will vary depending upon the judgments made by different publishers. For example—

> —One publisher might choose to consolidate a number of different businesses under a common heading, such as "Beauty Salons" Another publisher might choose to distinguish among, and list separately, businesses including "Hair Dressers," "Color Consultants," "Facials," "Manicurists" or "Fingernail Salons".
>
> —The terminology generally applied to particular goods and services varies from one geographic region to the next. For example, what may be listed under "Aerobics" in one city may be called "Dance Instruction" or "Exercise Studios" in another.
>
> —Particular goods and services may be in greater demand in certain areas of the country than in others. A Silicon Valley yellow pages directory will thus contain categorizations for products and services not yet in significant use elsewhere. Similarly, in the Midwest, there may be a great demand for "Well Drillers," whereas in the metropolitan East, municipal water may render that heading unnecessary.
>
> —Certain headings may create legal or ethical issues. For example, if a state proscribes gambling, a judgment must be made about how to characterize "Bingo Halls" and "Lotteries."
>
> —A directory publisher may make the judgment call to anticipate legal and regulatory developments with

such headings as "Recycling Services," "Air Quality Control Services," or "Asbestos Abatement and Removal Services."

The yellow pages publisher must take account of these and other considerations when determining how consumers are likely to use its directory. To do so, experienced directory representatives conduct extensive research, using a number of different reference sources—such as product guides, dictionaries, encyclopedias and marketing studies. In addition, they consult with professional lexicographers and linguistic experts who can help determine whether particular expressions are suitably crafted to reach the desired audience. And they spend substantial amounts of time discussing the need for new or different headings with the advertisers themselves.

Publishers also may choose to utilize different approaches in heading selection to enhance user-friendliness. They may employ different guides and subheadings—a restaurant guide, for example, could be organized by type of food, geographic location, hours of operation or type of service (formal, informal, takeout, delivery). They also may utilize cross-referencing techniques, directing a consumer's attention to other headings that the publisher considers to be related.

The process of selecting headings is a continuous one. The selection of headings for a particular directory will necessarily evolve over time, as consumers change their preferences or develop more sophisticated understandings of products, and as a market itself changes and expands into new services and technologies. Karaoke music and step aerobics, for example, are new products and services that have raised classification issues in recent years and have generated different responses from different publishers. In resolving such issues, publishers must balance (among other considerations) the benefits of creating additional specific headings with the possible burdens on current advertisers who do not wish to advertise under multiple headings.

Amici evaluate hundreds of separate requests for new headings each year. Some are accepted, while many others are rejected. In each case, Amici exercise their judgment to determine whether a new heading would improve their directories. Similar judgment calls are made by every publisher who relies on its own creative efforts, rather than copying, to produce a yellow pages directory or other data compilation that consumers wish to use.

2. *The Selection Of Particular Listings To Be Associated With Yellow Pages Headings Reflects Substantial Originality*

The Eleventh Circuit also concluded that the association of listings with particular headings lacks sufficient originality to be protected by copyright. According to the court, such association reflects no more than a "technique[] for the discovery of facts," a means of identifying an advertiser's own choice of how to be classified. (App. 8a.) Again, the court below has mischaracterized the process of creating yellow pages directories.

The determination of where to place specific listings is the product of very substantial creative effort on the part of the directory publisher and its representatives. The objective of that effort, like the objective of the effort involved in selecting headings, is to achieve user-friendliness—to ensure that each of the thousands of businesses included in a directory is categorized in a way that allows consumers to locate with ease the information they wish to obtain from that directory.

The placement of certain listings under certain headings may be straightforward; however, the placement of many other listings (or indeed the placement of the same listings under other categories) will frequently require difficult judgments and creative approaches. For example,

> —Pizza could be listed under "Carry Out," "Restaurants," "Food" or "Pizza."

—Landscape Contractors could be listed under "Lawn Maintenance," "Sod and Sodding Services," or "Nurseries, Plants and Trees."

—Dieticians could be listed under "Nutritionists," "Health and Diet Food Products," or "Weight Control Services."

—Boat Dealers may fall under "Boat Rental and Leasing," "Boat Storage," "Charters," "Fishing Parties," or "Boat Repair and Equipment."

Similarly, it might be problematic to list a pro-life advocacy group under a heading for "Abortion Counselling and Provision." A publisher may have to create several headings (such as "Pregnancy Counselling," "Abortion Alternatives," or "Family Planning Services") to ensure that the listings within the headings are not only accurate, but also respond to the sensibilities of the community served by the directory.

In each case, the publisher must choose among the many possible classifications and determine which among them are appropriate. These judgments will vary from publisher to publisher. Consequently, any one publisher's selection and arrangement of the listings to be included among each of the hundreds or thousands of categories in a directory will be different from another publisher's selection and arrangement (absent copying).

To ensure an informed judgment, the publishers' representatives discuss with advertisers the nature of their businesses—including the goods and services they offer; the specific brands they carry; the actual and potential geographic markets they seek to serve; the identity of the consumer groups which they seek to reach; anticipated changes in their businesses; the nature of any competitive advantages they may possess; and the various ways their goods or services might be utilized in connection with other goods and services.

Based upon its research and the policies it follows, the publisher determines the appropriate heading classifica-

tions under which each listing may fall. Typically, the determination is that the advertiser may come within several headings—often including headings that the advertiser itself did not initially consider. The publisher also may determine that the advertiser's business warrants inclusion and classification in more than one geographic directory. The publisher will often select for inclusion in a yellow pages directory listings from outside the precise geographic scope identified in the directory.

Publishers in fact employ market research firms to determine where the consumers residing in a geographic area shop for particular goods and services. Such studies are used by the publisher in its discussions with advertisers to determine the extent, location and type of directory advertising necessary to ensure maximum usefulness of each directory to both consumers and advertisers.

An advertiser may, of course, suggest specific headings under which it wishes to see its business listed. But the suggestion may be inappropriate under any of a number of policies that the publisher follows; if so, the publisher will not accept the advertiser's suggestion. For example, a publisher might refuse to list under the heading "Landscape Contractors" a company that performed referral services for landscaping, but not landscaping itself. Similarly, artificial flower companies have not been listed under "Florists," and exotic lingerie shops have not been listed under "Entertainment Bureaus"—notwithstanding the requests of advertisers. And all directory publishers must determine how to classify, for example, Chiropractors, Podiatrists, Homeopaths and Naturopaths.

It also is true that the advertiser ultimately must approve the placement of its listing under any particular category. Courts have generally held, however, that the identity of the party who has final approval rights is irrelevant for copyright purposes. *See M.G.B. Homes, Inc.* v. *Ameron Homes, Inc.*, 903 F.2d 1486, 1493 (11th Cir. 1990). In any event, such a right of approval cannot obscure the fact that the publisher retains final au-

thority over the selection and arrangement of all the listings to be associated with each of the headings in its directory; nor does it alter the nature or magnitude of the publisher's creative efforts in making that selection and arrangement.

B. If Left Standing, The Decision Below Could Effectively Nullify the Compilation Copyright In Yellow Pages Directories, As Well as In Computer Data Bases and Similar Works

There can be no doubt that the Court in *Feist* regarded white pages telephone directories as an especially clear case for the denial of copyright protection:

> Given that some works must fail [to satisfy the requirement for a de minimus quantum of creativity], we cannot imagine a more likely candidate [than Rural's white pages directory]. Indeed, were we to hold that Rural's white pages pass muster, it is hard to believe that any collection of facts could fail.

111 S. Ct. at 1297. As this suggests, along the spectrum of compilations, white pages telephone directories stand at one extreme. But the Court in *Feist* contemplated that most other compilations would qualify for copyright protection, noting that "the requisite level of creativity is extremely low; even a slight amount will suffice." 111 S. Ct. at 1287.

As discussed above, yellow pages directories more than satisfy the requisite standards for originality. Unable to deny copyright protection to BAPCO's directories altogether, the court below adopts an alternative that yields a functionally equivalent result for those directories that are competitive databases.

The Eleventh Circuit has determined that BAPCO's selection of yellow pages headings, and listings associated with each of those headings, are nothing more than mere facts identified through a discovery process. If that determination is the law, the legal significance and benefits of

a compilation copyright would be seriously threatened. Indeed, such an unbounded interpretation of what constitutes a "fact" could read out of the copyright law all practical protection for the selection and arrangement of factual information. Electronic publishers would be able to claim the right to reproduce and publish (via an electronic network or CD-ROM disks) the entire selection of names, addresses, telephone numbers, headings, and listings associated with each of those headings, from any publisher's yellow pages directory.

The implications of the Eleventh Circuit's decision are not limited to yellow pages telephone directories, but extend to other kinds of directories and catalogues as well as computerized data bases, data base management systems, and even LEXIS®, and WESTLAW® information data bases. Congress has specifically concluded that data bases are similar to directories and thus qualify for copyright protection. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 54 (1976); Final Report of the National Commission on New Technological Uses of Copyrighted Works ("CONTU") at 38 (1978). If the selection of materials included in a computerized data base can be said to consist solely of "facts" (as Donnelley and the Eleventh Circuit would characterize them), third parties could henceforth claim the unrestricted right to duplicate entire data bases, which is directly contrary to the congressional intent of the 1976 Act.

The *Feist* decision has provided important guidance on the constitutional basis for copyright protection. It reaffirms that copyright protection is available for even a modicum of creative originality in the selection or arrangement of pre-existing data. The decision below circumvents this result by recharacterizing what is clearly a copyrightable selection into uncopyrightable facts. If left standing, that decision threatens the existing legal foundation for protecting, and thereby encouraging the creation and dissemination of, copyrightable directories, catalogues and computerized data bases.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS AND IS CONTRARY TO FEIST

The Court also should grant BAPCO's petition for a writ of certiorari because the *en banc* decision of the Eleventh Circuit directly conflicts with a decision from the Second Circuit, and is contrary to this Court's own opinion in *Feist*. As a result, the opinion below has created substantial legal uncertainty for data compilation businesses nationwide. That uncertainty should be resolved expeditiously by a decision of this Court.

The court below holds that the selection of headings for a yellow pages directory does not constitute expression protected by the copyright laws. (App. 7a-9a, 14a.) But that holding is inconsistent with the decision in *Key Publications, Inc.* v. *Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509, 514 (2d Cir. 1991) ("*Key Publications*"). There the Second Circuit held that the determination of which categories to include in a directory and under what name "entailed the de minimis thought needed to withstand the originality requirement." *See also Kregos* v. *Associated Press*, 937 F.2d 700, 704-05 (2d Cir. 1991) (Plaintiff's selection of nine categories of statistics constitutes originality).

The Second Circuit in *Key Publications* also emphasized that infringement may be found "if there is a substantial similarity in the selection of businesses listed in the two publications." 945 F.2d at 514. *See also id.* at 517 (If defendant's directory had "exactly duplicated a substantial designated portion" of plaintiff's directory—"for example, all its listings of professionals such as medical doctors, lawyers, accountants, engineers and architects, an infringement action would succeed.") It is precisely such substantial (and thus unlawful) duplication in which Donnelley has engaged; yet the Eleventh Circuit, contrary to

Key Publications, has erroneously concluded that Donnelley has not infringed upon BAPCO's copyright.

Furthermore, by second-guessing the amount of originality entailed in particular BAPCO judgments as to how to select headings and arrange entries within those headings, the Eleventh Circuit has sought to transform the copyright originality requirement into a much more exacting standard than it is. As the Court observed in *Feist*, that requirement "is not particularly stringent." 111 S. Ct. at 1294. "[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily . . . ." *Id.* at 1287. *See also Atari Games Corp.* v. *Oman*, 979 F.2d 242, 243 (D.C. Cir. 1992) (noting that the Court in *Feist* "left no doubt that the [originality] requirement is indeed modest . . . ."); *Key Publications* at 513 (even the choice of a directory publisher not to include certain businesses which might not stay open long "alone indicates thought and creativity" sufficient to meet the originality requirement). The creativity that goes into selecting and arranging the listings in a yellow pages directory comfortably exceeds this minimal threshold. *See* pp. 4-11 *supra*.

Indeed, if one's simple classification of baseball cards as "premium" or "common" qualifies as protected expression, *see Eckes* v. *Card Prices Update*, 736 F.2d 859, 863 (2d Cir. 1984), then certainly the classifications of a yellow pages directory must likewise qualify. *See J.R. O'Dwyer Co.* v. *Media Mktg. Int'l, Inc.*, 755 F. Supp. 599, 601 (S.D.N.Y. 1991) (Plaintiff's selection of only "true" public relations firms to be included in its annual directory constituted sufficient originality under *Eckes*, notwithstanding that plaintiff was willing to include any firm willing to pay the printing fee). The decision below, however, requires a level of creativity for copyright protection that goes far beyond that required by the Second Circuit and by this Court in *Feist*.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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